SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1196

STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS AND WILLIAM L. FERGUSON, *Petitioners*

v.

UNITED PARCEL SERVICE, *Respondent*

To the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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No.

STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS AND WILLIAM L. FERGUSON, *Petitioners*

v.

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To the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The decision and order of the Petitioner Commission (App. A, *infra*) are unofficially reported 4 EPD ¶ 5047 (1972) [CCH Publication, "Employment Practices Decisions," cited herein as "EPD"].

The opinion and order of the Circuit Court for Prince George's County, Maryland (App. C, *infra*) are unofficially reported at 6 EPD 5001 (1973). The decision of the Court of Appeals of Maryland (App. D, *infra*) is reported at 270 Md. 202, 311 A. 2d 220, 6 EPD ¶ 8926 (1973).

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on November 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether a state court may constitutionally fashion a strict state procedural barrier which denies to an individual charging racial discrimination in employment the right to obtain relief from a systemic employment practice despite an undisturbed finding by a state civil rights agency that the challenged practice is racially discriminatory under this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The statutory provisions involved are the Maryland Fair Employment Practices Act, Art. 49B, Md. Code Ann. § 17 *et seq.* (1957, 1973 Supp.) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1970), as amended by the Equal Opportunity Act of 1972, 86 Stat 103 (1972). They are set forth in App. F and G *infra.*

The constitutional provisions involved are the Supremacy Clause, Article VI, Cl. 2, and the Fourteenth Amendment, Sec. 1, to the United States Constitution. They are set forth in App. H, *infra.*

STATEMENT

William L. Ferguson (Ferguson), an unemployed 32-year-old black male, filed a complaint on March 30, 1970 with the State of Maryland Commission on Human Relations (Commission) charging the United Parcel Service (UPS) with racial discrimination in hiring (App. B, *infra,* pp. B 2-3). The case proceeded through the statutory administrative process: an investigation was conducted of Ferguson's charges of UPS' hiring practices regarding the job in question, probable cause was found to believe UPS' hiring practices concerning the job were discriminatory, conciliation failed and the case was noticed for hearing (App. B, *infra.* pp. B 1-5).

The notice for public hearing specified that UPS must be prepared to answer charges recited in Ferguson's complaint and the Commission's staff report of its investigation. Both documents were sent to UPS along with the notice of hearing (App. B, *infra.*). The Commission then held two days of hearings on January 24, 1972 and January 31, 1972 when the following record was established:

UPS is a national concern employing 45,000 people. It is engaged in the business of delivering small packages to customers in over forty states. UPS operates a Maryland distribution center (HUB) in Prince George's County. Work at the HUB involves unloading, sorting and reloading over 70,000 packages daily.

One of the positions at the HUB is that of "loader/unloader," a position that involves unloading packages from trailer trucks, placing them on a conveyor belt and reloading the packages onto another truck. The

loader/unloader must possess skill and knowledge sufficient to understand the UPS sorting procedure so that packages handled are loaded on the proper truck. The loader/unloader job is an entry level position at UPS and requires only a good physical condition; no prior experience or special qualifications are necessary.

Since UPS has experienced a 50% turnover rate for the loader/unloader position, it continually has sought candidates for the job. To attract job applicants in 1970, UPS periodically placed newspaper advertisements in *The Washington Post*. The most recent figures revealed that about 4,000 people have applied yearly for this job at the HUB and about one out of every ten applicants was hired.

During 1970, job applicants at the HUB were required to complete an extensive UPS employment questionnaire which has been in use at the HUB since at least 1964. Among the things that applicants were required to disclose on the questionnaire were data concerning their educational achievements, credit background, personal history, employment history and experience, driving record, and arrest and conviction data.

On January 6, 1970, Ferguson applied for the loader/unloader position at HUB in response to a UPS advertisement. On that day he completed the UPS questionnaire which revealed among other things: that he had been arrested and convicted of nonsupport; that he had had six jobs over the previous ten years; that he had been discharged from his last job; that his Maryland driver's license had been suspended and revoked; and that he rented his home and had some financial difficulties.

At the time Ferguson applied for the loader/unloader job a high school degree was required for the position but the requirement was dropped later in 1970. The only UPS employment qualification which related to the job was the applicant's physical and mental capacity to perform, and a UPS official acknowledged that Ferguson possessed these qualities and could perform the job.

Ferguson's application was initially given a rejection rating by a UPS personnel interviewer although Ferguson was not advised of the rejection. The reasons given for Ferguson's rejection were based upon his responses in three areas: Arrest and conviction, work history, and revoked driver's license. A fourth disqualifying element, credit, was given later as justification for not hiring Ferguson. UPS contended the ultimate reason for Ferguson's rejection for the job was his failure to "project" himself as the type of individual who would be a long term employee.

UPS admitted that its employment qualifications were not evenly applied to all applicants. The flexibility accorded each criterion depended on the personnel interviewer's subjective notions about the qualities that would make a man likely to be a long term employee.

After not being contacted and observing another UPS advertisement for loader/unloader, Ferguson again returned to the HUB during February, 1970. Ferguson again applied on March 5, 1970, but was finally told not to come back unless called by UPS.

Over fifty percent of the applicants for the loader/unloader position were black. Despite the high percentage of black applicants, a four month UPS survey revealed that the UPS hiring process had an exclu-

sionary effect upon black applicants since only 36 blacks were hired as loader/unloader while 59 whites were hired for that position. Thus the number of whites hired under the UPS selection process for the loader/unloader position was approximately 1.6 times the number of blacks hired.

The racially exclusionary effect of UPS' hiring practices was also manifested in certain specific UPS employment qualifications:

A. *Arrest and Conviction Questions*

The UPS' application form contained questions concerning an applicant's arrest and conviction record which formed a basis for a decision to hire. The record indicates that with regard to arrests for offenses against the family and incarceration or nonsupport in Maryland and the nation, a disproportionate percentage of blacks over whites are apprehended and convicted.

B. *Credit and Related Financial Questions*

The UPS' application form contained several questions relating to an applicant's credit and general financial stability which also were used to qualify applicants. Dr. Homer Favor, a black employment expert, commented on the exclusionary effect of this factor when used as an employment qualification:

> . . . [A] system that doesn't provide them [blacks] with a significant attachment to the labor force, doesn't provide them with upward mobility . . . historically has tended to exclude those of us who happen to be black.

UPS has extended this financial consideration to cover home and car ownership as factors on which negative data could operate to disqualify a job applicant under

the overall evaluation of the applicant as a long term employee.

C. *Work History Questions*

The UPS application form contained several questions relating to an applicant's history and general employment experience which were also used to qualify applicants. The record reflects the unemployment rate among blacks to be nearly twice that of whites. Other evidence of record indicates that more blacks than whites in Ferguson's age and labor category were prone to higher job mobility and greater likelihood of dismissal.

D. *Driving Record Questions*

The UPS application form contained several questions relating to an applicant's overall driving record used to qualify applicants. While applying this criterion as an employment qualification, UPS admitted its exclusionary effect on blacks.

UPS did not perform any studies on its employment qualifications to determine whether they reasonably predicted successful performance on the job and no evidence was introduced on the subject.

After the two days of hearings, the Commission's Hearing Panel issued its Decision on March 3, 1972 and on March 8, 1972 it became an Order of the Commission (App. A, *infra.*). The Commission found that Ferguson had been the victim of racially discriminatory hiring practices. It ordered UPS to cease and desist from the use of the aforementioned hiring practices relating to the job which were found to be racially discriminatory and awarded Ferguson $150 back pay.

Subsequently, UPS appealed the Commission's Decision and Order to the Circuit Court for Prince George's County, Maryland. The Commission and Ferguson raised constitutional issues before the Circuit Court regarding the Commission's duty to eliminate racially discriminatory employment practices (App. E, *infra.*) The Court reversed the Commission's Order, distinguishing federal precedent and denying relief to eliminate the racially discriminatory employment practices found to exist. The circuit court, however, did not disturb the Commission's finding that UPS's employment practices were racially discriminatory.

The Commission and Ferguson appealed from the judgment of the circuit court to the Court of Appeals of Maryland. The United States Equal Employment Opportunity Commission (EEOC) filed their first *amicus curiae* before a state court supporting the action of the Commission. In their brief to the Court of Appeals, Petitioners again raised constitutional issues regarding the duty of state instrumentalities to eliminate racially discriminatory employment practices (App. E *infra.*).

Thereafter, by a decision dated November 6, 1973, the Court of Appeals of Maryland affirmed the judgment of the circuit court on the grounds that UPS had not been provided adequate administrative notice of the issues litigated under state law. The Maryland court in its opinion did not cite, distinguish or discuss federal precedent or the constitutional issues raised. Despite the Commission's findings to the contrary, the Court of Appeals concluded that Ferguson had not been discriminated against personally (App. D *infra.*, p. D-4).

REASONS FOR GRANTING A WRIT OF CERTIORARI

A State Court is Prohibited under the Federal Constitution from Creating a Strict Rule of Procedure which denies to an Individual Relief from Racially Discriminatory Employment Practices.

A. Introduction

The decision of the Court of Appeals of Maryland effectively sanctions racial discrimination under circumstances in which this Court specifically held it to be unlawful. The decision is in square conflict with *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The decision also negated the Commission's order to eliminate a systemic employment practice found to be racially discriminatory, an action that seriously misconstrues the nature of discrimination, the constitutional basis upon which a state fair employment practices commission operates, and the relationship between federal and state civil rights laws as established by Congress. Because the Court of Appeals has failed to follow the controlling precedent established by this Court, its decision should be reversed.

In another state case, *Connecticut Commission on Human Rights and Opportunities* v. *Veeder-Root Company, A Division of Veeder Industries*, — Conn. —, — A. 2d —, 6 EPD ¶ 8958 (1973) (*Petition for Cert. filed*, 42 U.S. L.W. 3340 (U.S. Oct. 27, 1973) (No., 73-703), the highest court of Connecticut also denied relief from systemic employment practices found to be discriminatory. The decisions of both the Maryland and Connecticut courts raise identical and substantial federal questions before this Court; that instrumentalities of a state have failed to execute a constitutional duty to eliminate identified discriminatory employ-

ment practices by the erection of arbitrary and unconstitutional procedural barriers to such relief.

The Maryland Commission is an administrative agency created with full powers to implement and enforce the state Fair Employment Practices (FEP) law.[1] Art. 49B, Md. Code Ann. §§ 17 *et seq.* (1957, 1973 Supp.) (App. F, *infra.*). The Maryland FEP law is identical in all substantive respects to its federal counterpart, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (1970), as amended by the Equal Opportunity Act of 1972, 86 Stat. 103 (1972) (*Compare,* substantive provisions, App. F and G, *infra.*). Title VII is administered by the Equal Employment Opportunity Commission (EEOC) which, like the Maryland Commission, receives or initiates complaints, conducts investigations thereof, and attempts to effect conciliation, 42 U.S.C. 2000e-4 (1970);

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[1] The Maryland Commission in form and operation was patterned after the National Labor Relations Board (NLRB). Compare 29 U.S.C. § 160 (1970) with Art. 49B, Md. Code Ann. §§ 12-15 (1957, 1973 Supp). The NLRB has been held to possess authority to vindicate the public interest. *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952); *NLRB* v. *West Kentucky Coal Co.*, 116 F.2d 816 (6th Cir. 1940); *cf. Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). Similarly, state civil rights agencies are like the NLRB in exercising full powers to vindicate the public interest as well as private rights. *City of Highland Park* v. *Michigan Fair Employment Practices Commission*, 364 Mich. 508, 111 N.W. 2d 297 (1961); *Arnett* v. *Seattle General Hospital*, 65 Wash. 2d 22, 395 P.2d 503 (1964). For an analysis of the history and relationship of state FEP agencies to federal laws, see, Tierney, *Separate But Equal—An Analysis of State Civil Rights Law Enforcement and its Interaction with Federal Laws*, 49 Notre Dame Lawyer, 122 (1973); Bonfield, *An Institutional Analysis of the Agencies Administering Fair Employment Practices Laws*, 42 N.Y.U.L. Rev. 823, 1035 (1967); Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 Vand. L. Rev. (1965).

but, unlike the Maryland Commission, EEOC possesses no cease and desist authority. Adjudication of Title VII charges and the formulation of remedies thereunder rests with the federal courts. 42 U.S.C. 2000e-5 (1970). In this respect the Maryland Commission singularly performs the same functions that are jointly performed under Title VII by EEOC and the federal courts. The Maryland Commission has been certified by the federal government as a substantially equivalent state agency under federal law.[2]

B. The State Procedural Barrier—Inadequate State Grounds

The Maryland Court of Appeals fashioned a strict notice requirement for Commission proceedings which is inconsistent with state law and denies to Ferguson fundamental fairness in the vindication of his rights.

Ferguson, when he filed his charge of racial discrimination, clearly alleged unlawful practices by UPS in its hiring process (App. B *infra.*, p. B-2-3). The Commission staff's report summarized the use of arrest and conviction records, driving records, and work history in the UPS hiring process:

> To use such criteria, in the absence of job relatedness, is to structure into the hiring process factors which tend to eliminate a disproportionate number of blacks and thus to have a discriminatory effect upon blacks (App. B, *infra.*, p. B-8).

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[2] 37 Fed. Reg. 9214, May 6, 1972 (Employment); 37 Fed. Reg. 16540, Aug. 18, 1972 (Housing). With the enactment of its FEP law, Maryland has adopted federal law as its own and the state courts' interpretation of that federal law is reviewable by this Court. *Standard Oil Co. of California* v. *Johnson,* 316 U.S. 481 (1942).

Thus the litigable issue was framed and UPS was provided with actual notice of it. The hearing proceeded on basis of this issue, with UPS being afforded a full opportunity to justify its hiring process (App. A, *infra;* p. A-9). UPS raised no objection at hearing to the proof submitted in support of this issue. After considering all the evidence, the Commission ordered *inter alia* that UPS cease and desist from the use of those hiring practices found to have a discriminatory effect (App. A, *infra.* p. A. 9-10).

The Maryland court then vacated the Commission's Order on the basis of a strict notice standard without an explanation of the court's factual basis for finding the notice insufficient or the reasons for according the Commission treatment different than manifested in its decisions regarding other Maryland administrative agencies. *See, Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 244-245 (1969) (J. Harlan, dissenting but concurring on inadequacy of state grounds).

The very Maryland authority dealing with administrative notice cited by the Court of Appeals demonstrates the Commission's notice was legally sufficient. In *Cassidy* v. *Baltimore Co. Board of Appeals,* 218 Md. 418, 146 A 2d 896 (1958), the Maryland court held that administrative notice need only apprise the respondent of the *character* of the administrative action and such notice is sufficient even though it may fall short of judicial standards. Furthermore, Maryland follows the principle that actual notice and appearance cures a failure to give written notice or any deficiencies therein. *Clark* v. *Wolman,* 243 Md. 597, 221 A. 687 (1966). A plain reading of the Commission's notice shows it clearly complied with these principles of Maryland law.

Significantly, another authority relied upon by the Maryland Court to erect its procedural barrier, Professor Davis, holds that administrative notice is liberally construed and a failure to object to the scope of issues actually litigated results in an amendment to the complaint and thus operates to cure any notice defect. DAVIS ADMINISTRATIVE LAW § 8.02 (1972 Vol.) citing, *Associated Home Builders of the Greater East Bay, Inc.* v. *NLRB,* 352 F. 2d 745 (9th Cir. 1965); and decisions of this Court: *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197 (1938); and *NLRB* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938). As in this Court's decision in *Mackay,* it is clear that there was no misunderstanding as to the factual and legal basis involved in the Commission's hearing.[3] Alternatively, the failure of UPS to object to the issue actually litigated cures any alleged defect in the administrative notice. *Associated Home Builders of the Greater East Bay, Inc.* v. *NLRB, supra.*

Under the Maryland rule of *Cassidy* v. *Baltimore Co. Board of Appeals, supra,* administrative notice

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[3] Also, even assuming *arguendo* Ferguson's complaint and the Commission report were insufficient notice to support the relief granted, the Maryland court's decision was still an arbitrarily strict procedural rule. The Commission's procedural requirements are similar to the NLRB in that amendments can be made to the complaint at any time. Art. 49B, Md. Code Ann. § 14(e) (1957, 1973 Supp.). The NLRB has been consistently permitted to amend its complaint to conform to the proof. *Consolidated Edison* v. *NLRB, supra at* 224-225. With this cited authority before it, the Maryland court should have treated Ferguson's complaint as amended by the Commission report and the proof of record. The court's failure to do this operated to deny to Ferguson fundamental fairness in that it required of him the ability to originally articulate his grievance with a lawyer's precision. *See, Love* v. *Pullman,* 404 U.S. 522 (1972).

must also be read in the light of the provisions of law under which it is given. Since the substantive provisions of the Maryland FEP law and Title VII are identical, UPS had the responsibility to read the notice in light of Title VII decisional law.

Title VII has been repeatedly interpreted to embody important concepts regarding the status occupied by persons seeking relief thereunder. The very term "discrimination" has been defined to mean unlawful conduct directed at a class. *Hall* v. *Wertham Bag Corp.*, 251 F. Supp. 184 (M.D. Tenn. 1966). Indeed, employment discrimination is considered to be an unlawful practice involving a class characteristic. *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969). An individual plaintiff can obtain class-wide relief. *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971); *Bowe* v. *Colgate-Palmolive Co., supra; Jenkins* v. *United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1968); *see also, Bailey* v. *Patterson*, 323 F. 2d 201 (5th Cir. 1963). Indeed, the individual is considered a private attorney general vindicating the public interest. *Graniteville Co., Sibley Division* v. *EEOC*, 438 F. 2d 32 (4th Cir. 1972); *Jenkins* v. *United Gas Corp., supra.*

The cited authority, when applied to the Commission's proceedings, clearly shows that adequate notice of the issues was given. The Maryland court inconsistently applied its own administrative notice standard to the Commission and, in effect, fashioned a novel and unfair procedural requirement for this case. *NAACP* v. *Alabama, ex rel. Flowers*, 377 U.S. 288 (1964); *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *see Sullivan* v. *Little Hunting Park, supra.* Such grounds are not adequate to bar review by this Court.

C. Failure to Apply Controlling Precedent

The effect of the state's strict procedural rule also operates to deny to Maryland citizens under state law relief to which they are entitled under federal law and guaranteed by the Federal Constitution. Under decisions of this Court when a person like Ferguson alleges employment discrimination, that allegation requires an examination of the *consequences* of the challenged employment practice upon members of Ferguson's class, that is, blacks. *Griggs* v. *Duke Power Co., supra; McDonnell-Douglas* v. *Green,* 411 U.S. 792 (1973); *see, Jenkins* v. *United Gas Corp., supra.* The Respondent's practices, not any individual treatment, were found to have victimized Ferguson. It is impossible to separate Ferguson from either the application of these practices or from his class characteristic. Therefore, in order to establish that Ferguson was a victim of race discrimination, the general employment practices at Respondent's facility must be examined and then remedied, if discriminatory.

The term "discrimination" and prohibited employment practices are not controlled by procedural sections of the state FEP law; but rather, are controlled by the substantive provisions of law. Consequently, the purpose of an individual charge of discrimination processed under either federal or state law is merely to initiate the subsequent law enforcement process, and does not determine the limits of that process. *Graniteville Co., Sibley Division* v. *EEOC, supra; Jenkins* v. *United Gas Corp., supra; Sanchez* v. *Standard Brands, Inc.,* 431 F. 2d 455 (5th Cir. 1970); *Ironworkers, Local No. 67* v. *Hart,* 191 N.W. 2d 758 (Iowa 1971).

The record below and the findings of the Commission established beyond doubt that the manner by which

UPS applied their employment qualifications to job applicants has an exclusionary effect upon blacks including Ferguson. UPS failed to meet its burden of proving the exclusionary practices, which unquestionably denied Ferguson a job, were related to job performance. *Griggs* v. *Duke Power Co.*, *supra*; *see*, *McDonnell-Douglas* v. *Green*, *supra*. In spite of the record, which was left undisturbed by the state courts, the Court of Appeals concluded:

> Having found that *there was no discrimination against Ferguson personally*, the Commission went on to issue a wide-ranging order, designed to reform what it regarded as United Parcel's discriminatory employment practices. *Ferguson* v. *United Parcel Service*, 270 Md. 202, 206, 311 A. 2d 220, 222 (1973) [Emphasis Supplied].

By such language the Court of Appeals has manifested clear error by either a misapplication of the principles of *Griggs* or a complete disregard of them. This Court in *Griggs* noted that for racially discriminatory employment practices to be unlawful they need not be associated with an employer's motivation or intent. The Commission correctly applied *Griggs* after finding that Ferguson was, indeed, not the victim of an individual or intentional discriminatory act. The Commission then found that Ferguson was discriminated against by the *consequences* of UPS' employment practices. For the Maryland court to characterize that there was no discrimination against Ferguson personally, denies to Ferguson any benefit from the concepts established under *Griggs;* and, consequently, defines the term "discrimination" under Maryland law in a manner which is in square conflict with controlling precedent. In effect, the Maryland court has

sanctioned discriminatory employment practices found by this Court to be unlawful.

D. Abdication of Constitutional Duty

The Maryland court's decision has avoided a duty under the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution to eliminate discrimination when it is discovered. It is firmly established that state civil rights agencies and state courts are under a constitutional obligation to enforce the same rights and provide the same remedies in the civil rights field as are available in federal courts. *Sullivan* v. *Little Hunting Park, supra; State of Minnesota* v. *Bergeron,* 290 Minn. 351, 187 N.W. 2d 680 (1971); *Gilliam* v. *City of Omaha,* 331 F. Supp. 4 (D. Neb. 1971), *rev'd on other grounds,* 459 F. 2d 63 (8th Cir. 1972); *see also, Betts* v. *Easley,* 161 Kan. 459, 169 P. 2d 831 (1946). Both federal and state civil rights laws are based upon constitutional principles and merely provide differing mechanisms to vindicate constitutionally protected rights. In effect, a person invoking a state civil rights law substantially equivalent to federal law is also invoking these constitutionally protected rights. Enforcement of these state laws includes a duty to provide constitutional remedies. *State of Minnesota* v. *Bergeron, supra.*

With respect to the instant case, the Maryland court's complete disregard for the discriminatory practices of the Respondent and its failure to cure the practices amount to unconstitutional state action. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). This Court stated in *Burton* that "no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them . . ." *Id.* at

725. By not acting against the Respondent's practices, the state court became a joint participant in the illegal discrimination by permitting it to continue unabated. *Evans* v. *Newton,* 382 U.S. 296 (1966); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *State of Minnesota* v. *Bergeron, supra; Jenkins* v. *United Gas Corp.,* 400 F. 2d 28, 34 (5th Cir. 1968); *see also, Potts* v. *Flax,* 313 F. 2d 284, 289 (5th Cir. 1963).

After finding discriminatory employment practices which operated against Ferguson and others, the Commission proceeded to fashion relief to eliminate each practice found unlawful (App. A, *infra,* pp. A-9-10). This relief was necessary to vindicate Ferguson's rights since any future attempts by him to secure employment would meet the same result under the application of the unlawful practices. This relief was also necessary to vindicate the public interest.

The concept of public interest or class relief has long been recognized as essential to the constitutional *duty* of formulating *complete* relief from a discriminatory practice. *Potts* v. *Flax, supra; Bailey* v. *Patterson,* 323 F. 2d 201 (5th Cir. 1963). Class relief has also been specially applied to employment practices by federal courts under Title VII. *Jenkins* v. *United Gas Corp., supra; Bowe* v. *Colgate-Palmolive Co., supra; Sprogis* v. *United Air Lines, supra.* Indeed, this Court has recognized the class aspects of Title VII. *Griggs* v. *Duke Power Co., supra.*

There is nothing in Maryland law which can repudiate the constitutional duty to afford an individual public interest relief from systemic discriminatory practices. Indeed, decisions of other states have recognized this duty and have accorded the same public interest relief to aggrieved persons filing complaints under state law as would be available under federal law.

Ironworkers, Local No. 67 v. *Hart,* 191 N.W. 2d 758 (Iowa 1971); *Jackson* v. *Concord Company,* 54 N.J. 113, 253 A. 2d 793 (1969); *Richardson* v. *School Board of Independent School District No. 271, — Minn. —,* 210 N.W. 2d 911 (1973).

The Maryland court's use of a strict procedural rule has denied to Ferguson necessary constitutional relief to which he and the public were entitled. Failure to grant this relief amounts to an unconstitutional approval of discriminatory practices.

E. Failure to Apply the Supreme Law of the Land

In *Testa* v. *Katt,* 330 U.S. 386 (1947), this Court ruled that the state court's failure to apply federal standards was in violation of Article VI, Section 2, of the U.S. Constitution which binds state judges to the "supreme law of the land." In effect, this Court ruled that a state judicial body could not, under the Supremacy Clause, deviate from national policy and ignore the necessity of full application of federal rights. Again in *Sullivan* v. *Little Hunting Park, supra,* this position was reaffirmed when this Court granted review of and then reversed the decision of the Virginia Supreme Court of Appeals for failure to act in accordance with federal anti-discrimination standards when the state decision denied relief on state procedural grounds.

Ferguson, by charging UPS with racial discrimination in its hiring practices, invoked federal protected rights. The Maryland court ignored the national policy established by Congress in Title VII when it so narrowly construed under state law employment discrimination and the status occupied by the charging party. Such action operates to frustrate the effective implementation of federal law.

When Title VII was enacted, a cornerstone of the Act included a provision for local enforcement by state civil rights agencies, Congress believing this approach to be the most effective means of eliminating discrimination. *See*, Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1212-1216 (1971). This procedure is effectuated by means of the deferral provisions which has been reviewed by this Court on two occasions. *Love* v. *Pullman*, 404 U.S. 522 (1972); *Crosslin* v. *Mountain States Tel. & Tel. Co.* 400 U.S. 1004 (1971). Under *Crosslin*, a state interest under Title VII cannot be ignored. That Congress intended that state agencies are to be an integral part of Title VII enforcement is further buttressed by the Equal Opportunity Act of 1972, which requires that the result of work under state FEP laws is to be given substantial weight by the federal government. *See*, Section 706(b) of Title VII, as amended March 24, 1972, P.L. 92-226, Sec. 4 (App. G *infra.*, p. G-2, emphasized provisions).

Title VII has been repeatedly interpreted to embody important concepts regarding the status occupied by persons seeking relief thereunder. Title VII has been interpreted to include the doctrine established in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that a complainant is not only seeking to make himself whole, but is also a private attorney general vindicating his rights and the rights of all those persons similarly situated. *Graniteville Co., Sibley Division* v. *EEOC*, 438 F. 2d 32 (4th Cir. 1972); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1970). This important status has been accorded aggrieved persons despite the fact that EEOC Commissioners

and the Attorney General can also invoke Title VII. *See,* 42 U.S.C. 2000e-5(a) and 6(a) (1970).

The Maryland court has denied Ferguson this status on the grounds that the Commission should have initiated its own charge to remedy the discriminatory practices it already identified as a result of Ferguson's charge and forms an integral part of Ferguson's civil rights claim. There is no basis under Maryland law for giving a different meaning and effect to an individual complaint than permitted under federal law. The Maryland law like federal law provides two methods to set the administrative process in motion—a charge by an individual and a charge by the Commission itself. *Compare,* Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-5(a)(1970). Both methods merely provide alternative means to set the administrative process in motion. Neither method does more than invoke the same law enforcing powers recited elsewhere in the statute. Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study,* 18 Vand. L. Rev. 965, 1019 (1965).

The policy behind the private attorney general concept has special application to the joint federal-state Title VII enforcement. The concept has the effect of reducing the incidence of recurring claims, relieving the workload of state and federal civil rights agencies, reducing inconvenience to employers, and promptly vindicating the public interest.[4] It would be absurd if each member of the class discriminated against had to individually seek relief. Such a result would substan-

[4] EEOC Chairman William H. Brown, III, stated that EEOC's current national backlog amounts to over 60,000 cases and is projected to exceed 90,000 by the end of 1974. The New York Times, July 30, 1973, p. 17, Col. 8. See also Crampton, *Causes and Cures of Administrative Delay,* 59 A.B.A.J. 937 (Sept. 1972).

tially increase the caseload of both federal and state courts.

Title VII has also been interpreted as not to impose a lawyer's knowledge to an aggrieved party filing a complaint. *Love* v. *Pullman, supra.* Ferguson or other aggrieved persons may believe that discrimination has occurred but may be unable to perceive or understand all the sources, effects, patterns or practices of an employer's system upon their own personal case of discrimination. The FEP law, both state and federal, contemplates the filing of charges by persons untutored in the technicalities of the law and they should not be barred from class relief because they may not be able to fully articulate their grievances. *Ironworkers Local No. 67* v. *Hart, supra; Jenkins* v. *United Gas Corp., supra; Macklin* v. *Spector Freight System, Inc.*, — F. 2d —, 5 EPD ¶ 8605 (D.C. Cir. 1973).

As already indicated, the Maryland court has applied to Ferguson and other aggrieved persons in Maryland the requirement that they set out their complaints with a lawyer's precision and they cannot obtain relief beyond issues articulated in the complaint. Aside from creating a discriminatory standard in itself so fundamentally unfair as to offend traditional notions of due process, the standard now imposed upon Maryland's aggrieved persons deprives them of their federally protected rights.

While the state law is not required to be a carbon copy of the federal law, *see Associated General Contractors of Mass., Inc.* v. *Altshuler,* 487 F. 2d —, 6 EPD ¶ 8993 (1st Cir. 1973), it cannot be interpreted so as to indirectly water down or emasculate the substantive federal rights it purports to protect. *State of Minnesota* v. *Bergeron, supra; Gilliam* v. *City of Omaha, supra.* Such action by the state court violates the

Supremacy Clause to the same extent as if it had directly refused to consider enforcement of a federal law. The Maryland court cannot be permitted to do indirectly that which it is prohibited from doing directly.

The Maryland decision is similar to that rendered by the Supreme Court of Virginia which was later reversed by this Court in *Sullivan* v. *Little Hunting Park, supra.* There the Virginia court refused to recognize federally protected rights on the grounds of a nonfederal procedural impediment. Significantly, this point was argued to the Maryland court and was succinctly stated by the EEOC:

> The Maryland law, Article 49B, [App. F. *infra.*] recognizes in its remedy provisions an affirmative obligation of the Commission to protect the rights of Maryland citizens both as defined by state law and as set forth in the Constitution of the United States. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969).[5]

CONCLUSION

All that Ferguson sought under state law was the ability to obtain relief from systemic employment practices which operated in a racially discriminatory manner. Moreover, systemic discriminatory employment practices must be eliminated where found. Ferguson was denied this relief by the Maryland court despite his claim which was grounded upon state and federal laws and constitutional principles. Under our federal system, implementation of both state and federal laws should be congruent to reduce duplication of effort. Ferguson cannot be denied relief by a state

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[5] *Amicus Curiae* brief filed by the EEOC before Court of Appeals of Maryland in *Ferguson* v. *United Parcel Service, supra;* p. 19.

court when he asserts a right to which he would have obtained relief under the federal scheme.

The state court's action should not be allowed to stand uncorrected. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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